49993-2
NO. ~~93466-5~~

SUPREME COURT OF THE STATE OF WASHINGTON

BRIAN RUNDQUIST,

Appellant,

v.

MICHAEL E. FOX and JANE DOE FOX, wife and husband, and the marital community composed thereof; FISCHER TRUCKING, LLC a Washington State limited liability company; FISCHER TRUCKING, INC. a State of Georgia corporation,

Respondents.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

I. INTRODUCTION

The legal issue in this case is not complex. It entails routine application of the rules involving service of process and statute of limitations.

Petitioner, Brian Rundquist, waited until two days before the statute of limitations ran to file his Complaint. In it, he named two defendants.

The first, "Fischer Trucking, Inc., a Washington State limited liability company," does not exist. This mistake by Rundquist was made despite prior correspondence expressly informing him that the proper defendant was "Fischer Trucking, Inc." It was never named, even after the 90-day tolling period under RCW 4.16.170 lapsed. This is undisputed and fatal.

The second defendant (and Respondent), "Michael E. Fox," for his part, was likewise not served until six months after the statute of limitations ran. Again, there is no complexity or unsettled law. Rundquist simply sued the wrong parties; something he would like the high court to fix. Even if this Court were an "error correcting" court—which it is not—no error was made. As detailed more fully below, the trial court simply applied law to the facts. Dismissal was proper. This Court should decline review.

II. STATEMENT OF ISSUES

1. Whether the Court should deny direct review where Rundquist fails to articulate a cogent ground for review Under RAP 4.2.

2. Whether the trial court properly dismissed Fox from the lawsuit under CR 56 when Rundquist undisputedly failed to serve a proper defendant within the statute of limitations, and the 90-day tolling period lapsed.

3. Whether this Court needs to review the *manner* of service on Fox when that issue is mooted by the undisputed lapse of the statute of limitations.

III. STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred on September 4, 2012. CP 1-5. Three years came and went without an action timely and properly brought against any single defendant. When this became apparent to the Honorable Vicki Hogan, she appropriately dismissed the case. CP 99-100. Not only was she correct to do so, but—perhaps more fundamentally—this appeal implicates no part of RAP 4.2(a). Direct review should be denied and the appeal dismissed.

After his accident, Rundquist was advised by representatives that the Defendant was "Fischer Trucking, Inc." *See* CP 46, 78; *see also* Brief of Appellant, at 6. Rundquist, however, waited until two days before the

statute of limitations to act—and filed, but did not serve, his Complaint. CP 1-5. In it, he named two defendants: "Michael E. Fox" and "Fischer Trucking, Inc., a Washington State limited liability company." *Id.* The latter does not exist; Fischer Trucking, Inc. is an Indiana corporation—a fact discernible through Google, or by Rundquist simply asking the representatives he had been communicating with. CP 136-137.

Rundquist then waited more than another month before serving "Fischer Trucking, LLC" (also not a proper or named defendant) on October 20, 2015. CP 10. The 90-day tolling period under RCW 4.16.170 then ran on December 2, 2015, after which Rundquist attempted to fix the problem by filing an Amended Complaint naming "Fischer Trucking, a Georgia Corporation," which likewise does not exist. CP 11-15. To date, Fischer Trucking, Inc., an Indiana corporation, has never been served. CP 136-137.

As for Michael Fox, the Court can also accept at face value the allegation that he was served "in accordance with the non-resident motorist statute, RCW 46.64.040."[1] The problem is, according to the allegation itself, this did not occur until February 24, 2016—almost six months after the statute of limitations ran and three months after the 90-day tolling period lapsed. CP 23.

[1] *See* Appellant's Brief, at pg. 7.

Recognizing his error, Rundquist filed a Motion for Partial Summary Judgment asking the trial court to bar Fox from raising the defenses of insufficient service of process or statute of limitations. *See* CP 136-150. The Honorable Elizabeth P. Martin denied Rundquist's Motion on April 8, 2016. Fox then filed his Motion to Dismiss, which was granted by the Honorable Vicki Hogan on June 3, 2016. CP 99-100. The trial court denied reconsideration of the ruling. CP 129.

Rundquist then appealed directly to this Court in the form of a motion for discretionary review. CP 130. It was opposed, and remains pending.

IV. ARGUMENT

This is a case in which the trial court did nothing remarkable. It applied basic law to undisputed facts, and dismissed a lawsuit in which no defendants were timely served. Even if this did somehow constitute error—though, it does not—Rundquist presents no reason that Division II of the Court of Appeals cannot address it. This is a fact-bound dispute about service of process and the state of limitations, which presents no conflicting precedent, nor "urgent matters of broad public import."[2] The appeal should follow the usual course available to any other litigant.

[2] Notably, at the time of filing Respondent's Brief, the Court has not ruled on the parties' Statement of Ground for Direct Review. As Rundquist fails to articulate any cognizable ground for direct review, the motion should be denied on those grounds alone.

A. The Court Should Not Accept Review

Before even reaching the merits, it bears strong emphasis that this case is not a candidate for direct review under RAP 4.2. In his motion for direct review, Rundquist made only a single passing citation to RAP 4.2(a)(3), claiming that the trial court's decision conflicted with prior Supreme Court decisions, and then a vague reference to equitable tolling being a "fundamental and urgent issue of public concern."[3] Though neither were meaningfully raised or argued,[4] they are addressed in turn.

Rundquist seems to misunderstand RAP 4.2(a)(3) which provides, in relevant part:

> Conflicting Decisions. A case involving an issue in which there is a conflict ***among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court.***

RAP 4.2(a)(3) (emphasis added). Even if it were true that "the trial court's decision conflicts with prior Supreme Court decisions,"[5] this would not speak to the standard. Virtually all appeals involve assertions that the trial court misapplied controlling law. If that justified direct review, every appeal would skip the Court of Appeals.

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[3] *See* Rundquist's Statement of Grounds for Direct Review, at pg. 6.

[4] When seeking discretionary review, this Court urged counsel to "argue with specificity (1) the criteria they are relying on, (2) why the challenged ruling was sufficiently erroneous to meet the applicable rule criterion, and (3) how that error established the relevant harm threshold." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, n.5, 232 P.3d 591 (2010).

[5] *See* Rundquist's Statement of Grounds for Direct Review, at pg. 6.

As to the Rule itself, Rundquist identified no splits within the Divisions of the Court of Appeals, nor any inconsistency amongst this Court's holdings. In fact, Rundquist argues the opposite—that the law is clearly established, but the trial court simply failed to properly apply it. This, by definition, does not warrant or support a direct path to the Supreme Court.

This ground for direct review—which was the only one identified by name in Rundquist's motion—is inapplicable. The Court would be justified in ending its analysis there, and denying direct review.

Rundquist also added some language seemingly borrowed from RAP 4.2(a)(4), which speaks to direct review of "fundamental and urgent issue[s] of broad public import which require[] prompt and ultimate determination." It, again, is not applicable here. Rundquist's appeal, rather, raises the most routine kind of error correction.

As framed by Rundquist, the first issue is whether the trial court properly construed factual allegations regarding an employment relationship; and the second issue is whether Fox was "served by mail."[6] These issues do not broadly implicate the citizenry of Washington, nor is any particular time-sensitivity articulated—Rundquist does not claim

[6] *See* Rundquist's Statement of Grounds for Direct Review, at pg. 5.

otherwise. "Equitable tolling"[7] is an "issue of public concern" in the same sense that all laws of general application are of public concern. But that is not to say this Court should entertain every business partnership dispute, public records skirmish, or jaywalking violation on direct review. RAP 4.2(a)(4), logically, requires more. And Rundquist does not present more.

In short, and with due respect, this is a relatively narrow, fact-sensitive appeal, which does not extend far beyond the parties to it. Rundquist is entitled to take it as of right, to be sure. But this case does not present any compelling circumstances that warrant an immediate audience with the Supreme Court.

This Court should dismiss the appeal.

B. The Trial Court Properly Dismissed Fox From the Lawsuit

Even if the Court were to reach the issues raised, it would find that they lack substantive merit. A fair review of the record—which, unfortunately, Rundquist does not present—establishes that the trial court's ruling was factually and legally accurate. The issues raised are taken seriatim.

The first is whether the trial court was obligated to let Rundquist plead his way around a lapsed statute of limitations. Specifically, he argues that because he alleged "Fox was employed by Fischer Trucking,

[7] *See id.* at pg. 6.

LLC in Snohomish, Washington [a nonexistent entity]," the trial court was bound to accept it as true—despite the fact that everybody knows it to be untrue, and at this point a CR 11 violation.

Several observations are in order.

One, Rundquist's reliance on CR 12(b)(6) is misplaced. This was a converted summary judgment motion. As the dismissal Order reflects, Rundquist offered—and Judge Hogan considered—matters outside the pleadings. *See* CP 99-100 ("The Court having considered... Plaintiff's Response *and the supporting declaration of Jonathan Lee*") (emphasis added); *see also* CP 51-63. Accordingly, by operation of CR 12(b), the motion was "treated as one for summary judgment and disposed of as provided in rule 56." *See also Citizen v. Clark Cty. Bd. of Comm'rs*, 127 Wn. App. 846, 852, 113 P.3d 501 (2005) ("Affidavits submitted in response to a CR 12(b)(6) motion are 'matters outside the pleadings' that convert the motion into a summary judgment motion."). And applying that standard, there was obviously no admissible evidence (*see* CR 56(c)) that Fox was employed by the limited liability company Rundquist mistakenly identified in his complaint. The trial court did not err in so holding.

Two, even if the analysis were under CR 12(b), Rundquist's analysis is, stated candidly, absurd. According to him, a plaintiff with a

time-barred claim can "allege" that he or she was timely, and the trial court must accept that as true under a "facts favorable" construction. By this logic, a party could plead his or her way around any defect through boilerplate, *e.g.*, "Plaintiff timely served the defendants," "Plaintiff named all necessary parties," and the like. As here, Rundquist is asking the Court to accept as true something we *all* know to be false. "Fischer Trucking, LLC" never employed Fox, and no Civil Rule should be interpreted in favor of requiring the trial court to accept a falsehood to the contrary. *See* CR 1 (rules shall be "construed and administered to secure the just... determination of every action."); *see also State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) ("Commonsense informs our analysis, as we avoid absurd results in statutory interpretations"); *cf.* RPC 3.3. (overriding duty of candor toward tribunal).

Three, even ignoring all of the above problems, Rundquist's argument suffers from another flaw: he never served any proper defendant within 90 days of filing his Complaint, which is apparent *on the face of his Complaint*. Rundquist's caption identified "Fischer Trucking, Inc., a Washington State limited liability company" as a defendant (emphasis added). An entity can be a "corporation" or it can be a "limited liability company"—but, by definition, it cannot be both. This is a nonexistent entity, the naming of which cannot toll a statute of limitations. *See, e.g.,*

Teller v. APM Terminals Pacific, Ltd., 134 Wn. App. 696, 142 P.3d 179 (2006) ("neither the tolling statute nor the *Sidis* decision allows plaintiffs to circumvent the statute of limitations by naming and serving one or more improper defendants in order to acquire extra time to determine the correct defendants"); *see also* Tegland, 14 WASHINGTON PRACTICE § 7:12 (2d ed. 2016) (similar). Even if the trial court were required to accept false-facts, it was certainly not required to ignore binding authority.

C. The Court Need Not Reach the Issue of *Manner* of Service Because No Service Was Timely

Rundquist's second issue warrants short shrift, because it is moot. *State ex rel. Carriger v. Campbell Food Mkts., Inc.*, 65 Wn.2d 600, 606-07, 398 P.2d 1016 (1965) (findings immaterial to the issues in the case need not be reached). Whether Fox was served "by mail" or under the "motorist statute" on February 24, 2016, is of no consequence, given that *neither* happened within the 90-day tolling period.

If, as here, a plaintiff fails to serve a proper party within the 90-day tolling period, "[t]he action is treated as if it were never commenced . . ." Tegland, 14 WASHINGTON PRACTICE § 7:12 (2d ed. 2016). From the bench, the trial court simply stated:

> Defendant Fox's motion to dismiss is granted. First of all, serving Fox by mail was never authoritative service of process without commission of the court.[8]

Setting aside the fact that the "written order controls over any apparent inconsistency with the court's earlier oral ruling," *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000), and the Order reflects no error, this distinction is irrelevant. Neither the trial court's holding, nor the underlying analysis, swung on the nature of the service. The issue was the timing. Regardless of the method, or whether it was properly verbalized, the 90 day tolling period expired.

Because Rundquist fails to establish grounds for review—or even error in the trial court's decision—Fox respectfully asks that this Court deny review.

V. CONCLUSION

Review should be denied and, consistent with RAP 4.2(e)(1), this case should be transferred to the Court of Appeals. Further, Fox was properly dismissed from the lawsuit, as the statute of limitations lapsed without a proper defendant being served. The trial court correctly applied the law to the facts of the case, and the appeal should be denied.

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[8] RP 18.

RESPECTFULLY SUBMITTED this 28th day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the below date, I caused the foregoing document to be electronically filed with the Clerk of the Court (Supreme@courts.wa.gov), and caused delivery of a true copy of the foregoing document to counsel of record as indicated below:

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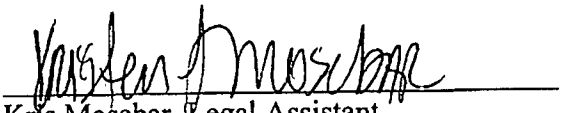

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Rundquist v. Fox, et al.
Supreme Court of WA No. 93466-5

Dear Clerk of the Court:

On behalf of Rodney L. Umberger and Jordann M. Hallstrom attached please find the Brief of Respondent for filing in the above-referenced matter.

A hard copy will be sent via legal messenger to Appellant's counsel.

Sincerely.

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